Supreme Court, U. S.
JUL 17 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, [illegible]

NO. 80-73

AMERICAN HOME ASSURANCE COMPANY,
Petitioner

VERSUS

COMMERCIAL UNION ASSURANCE COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS, FOURTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, 1980

NO.

AMERICAN HOME ASSURANCE COMPANY,

Petitioner

versus

COMMERCIAL UNION ASSURANCE COMPANY,

Respondent

QUESTIONS PRESENTED

1. Whether the State of Louisiana will be permitted to abandon the system of delegated powers provided by its constitution when such abandonment effectively violates Petitioner's rights protected by the United States Constitution.

2. Whether this Honorable Court will permit the judiciary of the State of Louisiana to abondon the system of delegated powers provided by Louisiana's constitution, there being no other forum to which Petitioner can turn.

3. Whether the State of Louisiana has impaired rights vested in Petitioner in contractual relationships with the State of Louisiana, Respondent or Petitioner's insured.

4. Whether the impairment of Petitioner's contractual rights violates protections afforded by the United States Constitution.

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

NOW COMES the Petitioner and respectfully moves this Court for leave to file the annexed petition for writ of certiorari under Section 1257(3) of Title 28, United States Code and Articles I, II, and III of the Constitution of the United States directed to the Louisiana Court of Appeal, Fourth Circuit to review an order and judgment of that court entered on January 10, 1980, writs refused by the Supreme Court of Louisiana, April 18, 1980, and more particularly described in the petition, and for such orders and further relief as may be just and proper.

Sign: ADAMS AND REESE

BY: _____
ROBERT C. BJORK

_____
FRANK M. ADKINS

_____
ERIC A. HOLDEN

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS, FOURTH CIRCUIT

The petitioner, American Home Assurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Louisiana Court of Appeal, Fourth Circuit, rendered January 10, 1980.

OPINIONS BELOW

The opinions of the courts below, consisting of the written reasons for judgment of the Civil District Court, Parish of Orleans, State of Louisiana (unreported), the opinion of the Louisiana Court of Appeal, Fourth Circuit, and the denial of rehearing thereon, 379 So.2d 757 (January 10, 1980) and the denial of Petitioner's application for writs of certiorari and review by the Supreme Court of Louisiana, 383 So. 2d 23 (April 18, 1980), all appear in the appendices hereto. The principal effects of these decisions are outlined below in Petitioner's Statement of the Case.

JURISDICTION

The judgment of the Louisiana Court of Appeal, Fourth Circuit, was entered on January 10, 1980, and petitioner's timely application for rehearing was denied February 20, 1980. The timely application for writ of certiorari and review was denied April 18, 1980, by the Supreme Court of Louisiana. This Court's jurisdiction is invoked under 28 U.S.C. Section

1257(3) and Articles I, II, and III of the Constitution of the United States, particularly Article I, Section 10, Clause 1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 10, Clause 1. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

STATEMENT OF THE CASE

On April 3, 1974, two employees of a subcontractor were injured while engaged in construction at Avondale Shipyards. Subsequently, both men filed suit against the subcontractor and Avondale Shipyards, Inc. as well as certain mangement personnel of both companies. The primary liability insurer responsible for these injuries was Commercial Union Assurance Company (hereinafter referred to as Commercial Union or Respondent).

In July of 1975, an amended petition added American Home Assurance Company (hereinafter referred to as American Home or Petitioner), the excess insurer of Avondale Shipyards,

Inc. On July 17, 1975, the injured men settled with Commercial Union for a total of Two Hundred Fourteen Thousand Dollars ($214,000.00). Commercial Union was released, but rights against the executive officers and American Home were reserved. Therefore, American Home and its insured remained exposed to possible extensive liability, which liability could have far exceeded the limits of Commercial Union's primary liability. As a result, American Home was forced to assume the defense of its insureds pursuant to the provisions of its excess policy.

To avoid the hazards of litigation, American Home entered into a settlement with the injured men on March 29, 1976. Each received Thirty-One Thousand Two Hundred Fifty Dollars ($31,250.00) for a total settlement of Sixty-Two Thousand Five Hundred Dollars ($62,500.00) paid by American Home, and the injured men dismissed their suit.

Although Commercial Union's policy provides for limits of coverage up to Three Hundred Thousand Dollars ($300,000.00), it only paid out Two Hundred Fourteen Thousand Dollars ($214,000.00) in accordance with the terms of its settlement. American Home paid to the injured men an additional Sixty-Two Thousand Five Hundred Dollars ($62,500.00) in an effort to avoid a potentially greater liability, with the justified expectation that Commercial Union would be liable in indemnity to pay over any such amount as still came within

the Three Hundred Thousand Dollars ($300,000.00) limits of coverage afforded by the primary policy.

Under the settlement agreement between Commercial Union and the injured men, the injured men agreed to give to American Home and the insured's executive officers a "credit" for the amount of the primary policy, but such full credit would only be received were the surviving lawsuit to proceed to judgment. In agreeing to such terms, Commercial Union placed American Home in the unenviable position of choosing between protecting its own rights by going to trial in defense of its insureds and claiming its so-called "credit" from the injured men after judgment, or settling with the injured men and seeking its "credit" from Commercial. It is clear that American Home received no *actual* credit from the injured men by settling with them to avoid further litigation. No credit or deduction was applied to the American Home settlement by the injured men with respect to the unexhausted primary limits, and the injured men were only fully satisfied when each received additional sums from American Home above and beyond their settlement with Commercial. This additional settlement amount was still within the limits of the primary policy, indicating that the injured men were totally satisfied by an amount covered by the primary policy.

American Home filed this suit against Commercial in order to recover the Sixty-Two Thousand Five Hundred Dollars

($62,500.00) American Home paid to the two injured men in settlement, together with attorneys' fees and costs incurred.

In the trial court, American Home filed a Motion for Summary Judgment asserting that, as a matter of law, Commercial Union is liable to American Home to the extent that American Home paid settlement funds which, when added to the settlement funds paid by Commercial Union, were within the policy limits of Commercial Union. American Home's Motion for Summary Judgment was denied.

Thereafter, Commercial Union filed a Motion for Summary Judgment asserting that, as a matter of law, Commercial Union is not liable to American Home for any sums the latter paid in settlement. It raised no affirmative defenses. Commercial Union's Motion for Summary Judgment was granted with written reasons by the Honorable District Judge. (Copies of the Judgment and Reasons for Judgment are attached hereto as Appendices A and B.)

Though the matter is not entirely clear, the trial court appears to have based its decision on two grounds. The first ground of the trial court's decision was that American Home was under no obligation to make payments to the injured men since American Home's liability would not attach "unless and untill the insured, or the insured's underlying insurer, shall have paid the amount of underlying limits." However, the trial

court's reasoning continued, notwithstanding the protection of the above quoted policy provision, American Home made payment to the injured men even though Commercial Union's limit had not been expended. The trial court seems to have reasoned that because of American Home's allegedly voluntary act of settlement it cannot now be heard to complain.

Secondly, the trial court stated that because Commercial received a complete release from the injured men upon settlement, such release was effective to relieve Commerical Union from its "total liability". The district court further stated that, while it is true Commercial was able to settle for less than its policy limits, the Supreme Court case of *Futch v. Fidelity and Casualty Co.*, 166 So. 2d 274, 246 La. 688 (La. 1964), which in the eyes of the district court "undoubtedly overruled" *Maryland Casualty v. Marquette Casualty Co.*, 143 So.2d 249 (La.App. 4th Cir. 1962), holds that such a fortunate event for a primary insurer is of no consequence to the excess insurer who is responsible for excess coverage. However, such a conclusion seems inapplicable to the present situation, for Commercial Union clearly anticipated its duty to indemnify American Home at least to full primary limits. It was, in fact, such potential liability that prompted the insertion of the "credit clause" in Commercial's settlement with the injured men.

The decision of the Honorable District Judge was appealed to the Fourth Circuit Court of Appeal, wherein two Specifications of Error were noted. First, it was argued that the trial court erred in failing to recognize plaintiff's subrogation rights against defendant. Second, it was argued that plaintiff could recover under the Civil law theory of *actio de in rem verso,* or unjust enrichment.

The Court of Appeal affirmed the decision of the trial court January 10, 1980. (A copy of the Opinion of the Court of Appeal is attached hereto as Appendix C.) In regard to the subrogation issue, the Court of Appeal held that *Maryland Casualty v. Marquette Casualty Co., supra,* wherein an insured was held entitled under the theory of subrogation to recover from a primary insurer the amount the former had paid in settlement, was distinguishable on its facts. Further, the Court of Appeal stated that whatever its effect, the *Maryland Casualty* case must yield to *Futch v. Fidelity and Casualty Co., supra.* The Court of Appeal held that *Futch, supra,* required the finding that "[I]n making the payment to the injured workmen, [plaintiff] settled its own liability, not [defendant's], and no basis for subrogation exists."

In regard to the unjust enrichment argument, the Court of Appeal held that two elements essential to recovery under that theory, enrichment to defendant and impoverishment to plaintiff, were lacking. The Court of Appeal then affirmed the decision of the trial court.

On February 7, 1980, petitioner filed an Application for Rehearing by the Fourth Circuit Court of Appeal. (appendix D.) In its Application, American Home plaintiff reasserted its subrogation and unjust enrichment arguments and presented a third theory of recovery: Breach of a primary insurer's duty to confect reasonable settlement, which duty is owed directly to petitioner as an excess insurer. On February 20, 1980, petitioner's Application for Rehearing was denied.

On March 6, 1980, an Application for Writ of Certiorari was filed with the Supreme Court of Louisiana. In that petition, it was further asserted that the Court committed an unconstitutional impairment of contractual obligations when it required petitioner, an excess insurer, to assume liability for losses covered under a primary insurer's policy. On April 18, 1980, the application was denied by the Supreme Court of Louisiana, the highest court of the state. (Appendix E.)

REASONS FOR GRANTING THE WRIT

I. LOUISIANA'S FAILURE TO ADHERE TO THE ALLOCATION OF GOVERNMENTAL POWERS BETWEEN ITS SEPARATE BRANCHES DEPRIVES PETITIONER OF RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION.

Petitioner, American Home Assurance Company, turns to this Honorable Court for relief from a captious practice

which has invaded the insurance industry in the State of Louisiana. Unlike any other state in the Union, Louisiana permits a primary insurance carrier to settle with a personal injury plaintiff and reserve his rights against both the insured and the excess carrier. This practice has become so embedded in the business of settling personal injury suits that Louisiana courts routinely sanction its use by enforcing the unjust settlement agreements which it spawns. Petitioner has diligently pursued its remedy through Louisiana's courts and received only a judicial shrug of the shoulders: That is the way things are done here, and Louisiana courts will do nothing about it.

It is worthy of note that Louisiana is one of two states in which such a practice could arise procedurally. Only by virtue of the special statute[1] permitting a plaintiff to proceed directly against the defendant's insurance carriers may an excess carrier find itself in the unenviable position between the plaintiff and the primary carrier. Between the hammer and the anvil, the excess insurer must contribute to the primary's settlement fund or face the prospect of allowing the plaintiff to proceed against the excess limits alone.

Although Petitioner was compelled to pay out $62,500.00 as a result of Commercial Union's failure to exhaust

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1 LSA-R.S. 22:655 (1978)

its limits, its primary concern is not with its pecuniary loss. Rather, Petitioner abhors the invidious consequences of the practice and the continuing deprivations of its constitutional rights in an insurance environment in which the terms of its policies can be judicially legislated at the whim of Louisiana's courts. The consequences are not limited to Petitioner's direct exposure to liability. By permitting the primary to make its own peace with the plaintiff, the state effectively allows the plaintiff to proceed against both the insured and the excess carrier. If the excess declines to pay out sums which the primary should have provided, the insured must run the risk of a judgment which would exceed the limits of both policies. At the very least, the primary carrier's financial responsibility should be available in full in the effort to satisfy the plaintiff without the hazards of litigation.

The effect of this captious practice in Louisiana is to deprive persons residing or doing business in Louisiana of their constitutional rights. These rights include those protected by the separation of powers and the prohibition against the impairment of contracts. The importance of the separation of powers has long been recognized by the courts of this nation. *U.S. v. Brown,* 381 U.S. 437 (1965). Although the United States Constitution delineates the respective powers of the three branches of the government, the states have the authority to allocate the powers of the state branches of government either consistent with or inconsistent with the system chosen

in the federal constitution. However, in the present case, Louisiana has destributed the powers of the three branches in accordance with the method of Articles I, II, and III of the federal constitution. Once these powers have been allocated, the federal courts should not hesitate to enforce the state-determined separation of powers. In *Sweezy v. New Hampshire,* 354 U. S. 234 (1957), the Court reasoned,

> It is largely principles of federalism, for example, that prevent federal courts or agents from imposing separation-of-powers notions on states choosing to structure themselves along different lines.

Thus, it is fairly to be implied that federal courts *may* preserve and uphold rights granted under the United States Constitution when a branch of state government acts not pursuant to the structure "chosen" by the people of that state but in derogation of that choice. When powers have been expressly allocated to one branch by the state, principles of federalism do not prevent federal courts from enforcing that allocation. Since Louisiana courts have, by permitting Commercial Union to amend a contract approved by Louisiana's executive branch, amended a law, and usurped a power specifically delegated to the legislative branch in Article 2, §2, of the 1974 Louisiana constitutional rights. It is clear that no adequate remedy exists in the state court system.

Secondly, the Louisiana courts have, in permitting Commercial Union to amend legislative acts, impaired the

contractual rights of the petitioner. American Home has been subjected to liability beyond that for which it had contracted and that which had been approved by the Commissioner of Insurance. In *Offshore Logistics, Inc. v. Arkwright-Boston Manufacturers Mutual Insurance Co.*, 469 F.Supp. 1099 (E.D. La. 1979), the Louisiana Federal Court ruled that insurance contracts impose a duty upon a primary insurer to act in good faith toward the insured and the excess insurer. This holding was reached by examination of state and federal jurisprudence from Louisiana[2], California[3] and Minnesota[4], as well as a national treatise on insurance law.[5] Notwithstanding such compelling authority, in the instant case the Louisiana courts have refused to impose a standard of good faith and have instead judicially altered the applicable insurance contracts so as to destroy any enforceable standard of conduct.

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2 *American Mutual Liability Insurance Co. v. Cooper*, 61 F.2d 446 (5th Cir. 1932); *Ward v. State Farm Mutual Automobile Insurance Co.*, 539 F2d (5th Cir. 1976).

Cousins v. State Farm Mutual Automobile Insurance Co., 294 So.2d 272 (La.App. 1st Cir. 1974).

3 *Valentine v. Aetna Insurance Co.*, 564 F.2d 292, (9th Cir. 1977).

Peter v. Travelers Insurance Co., 375 F.Supp. 1347 (C.D. Cal. 1974).

4 *Continental Casualty Co. v. Reserve Insurance Co.*, 238 N.W. 2d 862 (Minn. 1976).

5 R. Keeton, Insurance Law, §7.8(d) (1971).

Thus, not only does the instant case constitute a direct conflict with the rulings of federal courts which have considered this issue, but it raises a frightening perception that the Louisiana judiciary has forsaken its duty to uphold the Constitution and will now allow a state to rewrite insurance policies and to impair the obligations of contracts.

In contrast, the Supreme Court of Minnesota has recognized the constitutional issues raised by a failure to enforce the contractual obligations set out in insurance policies. In *Continental Casualty Co., supra,* the Minnesota Supreme Court stated that the imposition of a good faith standard as between primary and excess insurers may obviate the infirmity of unconstitutional contractual impairments. Though the United States District Court, Eastern District of Louisiana has acknowledged the correctness of *Continental Casualty Co.,* in the instant case the Louisiana state courts have ignored Minnesota's important constitutional admonition.

In summary, Petitioner is left without the protection of the system of allocation of powers chosen by Louisiana's people and must turn to this Honorable Court. A writ should issue to consider and protect American Home and other Louisiana residents and businesses from further deprivation of constitutionally protected rights and the Louisiana judiciary's invasion of executive and legislative domains.

II. THE DECISION BELOW SANCTIONS THE IMPAIRMENT OF PETITIONER'S CONTRACTUAL RIGHTS IN DEROGATION OF ARTICLE I, §10, CLAUSE 1 OF THE UNITED STATES CONSTITUTION

In order to adumbrate Petitioner's second argument to this Honorable Court, counsel will address the separate elements of analysis necessary to establish the unconstitutional impairment of Petitioner's contractual rights. After alluding to the purposes of the Contract Clause, considerable attention will be given to the identification of the contractual rights thought to be impaired by the State of Louisiana. Next, the impairing act of the State will be set out, and, last, this Court's test of the constitutionality of the impairment will be addressed.

A. *Purpose of the Constitutional Provision*

Although states have the power, under some circumstances, to alter contractual relationships between parties, that power is not unlimited. Rather, the provision of Article I, §10, Clause 1 of the Constitution contains an express prohibition which is limited only by the necessary perquisites of the partial autonomy of state government.

The general purpose of this Contract Clause is to encourage trade and commerce by promoting confidence in the stability of contractual relationships. This purpose was

explored by Chief Justice Marshall in *Ogden v. Saunders*, 12 Wheat 213 (1827):

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expectd from a reform of the government.

25 U.S. at 354 and 355. *See also, Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1933). It is the alteration of debtor-creditor relationships in the insurance industry and the destruction of confidence in the plain terms of insurance policies to which this application addresses itself.

B *Contracts Impaired By The State of Louisiana*

An inquiry into whether a state has exceed the limitations imposed by the Contract Clause begins with the identification of the contracts impaired. Petitioner has identified

four sources of contractual rights deprived by Louisiana: (1) Petitioner's rights vested by a contractual relationship with the State of Louisiana through its Commissioner of Insurance; (2) obligations which flowed to Petitioner from a contractual relationship between Commercial Union and the State of Louisiana; (3) the policy of excess insurance issued by Petitioner for Avondale Shipyards and its executive officers; and (4) obligations which flowed to Petitioner from Commercial Union's contract of primary insurance. The last two mentioned sources of rights are conceptual mirror images of the first two and will be considered as such.

(1) *Contracts Between Commissioner of Insurance and Insurance Companies*

Two sources of law provide the basis for finding contractual relationships between the Commissioner of Insurance and the two insurance companies. First, a statute or a legislative grant of authority will vest rights and obligations in the entities with which it deals. Second, a contract may be implied from facts and circumstances surrounding the relationship of the insurance companies with the Commissioner.

The concept that a statute or legislative grant of authority creates contractual rights has been affirmed by this Honorable Court in *United States Trust Company of New York v. State of New Jersey*, 431 U.S. 1 (1977):

> In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State. In addition, statutes governing the interpretation and enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis. [Citations omitted.]

431 U.S. at 17.

Thus, when a state, through an administrative agency approves pursuant to statute a policy of insurance, it evinces a legislative intent to create rights of a contractual nature between the State and the insurance company. *See, Douglas v. Commonwealth of Kentucky,* 168 U.S. 488 (1897); *Fletcher v. Peck,* 6 Cranch 87 (1810). The Louisiana legislature has provided that the approval of the Commissioner of Insurance is a prerequisite to the issuance of an insurance policy. LSA-R.S. 22:620.[6] Once this approval was granted to American Home's policy, a contract arose between the State of Louisiana, through the Commissioner of Insurance, and Petitioner which entitled American Home to issue the policy under the terms and conditions approved.

Of course, Commercial Union enjoyed a similar contractual relationship pursuant to its approved primary policy

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6 Text set out in Appendix F

of insurance. A necessary corrollary of the rights which it obtained from the State was the obligations which it agreed to fulfill. Because Commercial Union's policy contained a provision obligating Respondent to indemnify its insured up to specified limits, Respondent promised the State it would protect the State's citizens, Respondent's insureds, up to those limits. Necessarily, this promised protection created a right to be protected in American Home as Avondale Shipyards' excess insurer. When the State then permitted Commercial Union to escape its liability by paying out less than the policy limits, it broke faith with American Home and imposed Respondent's obligations on Petitioner. In so doing, it impaired the contractual rights flowing from the State to Petitioner and from Commercial Union to American Home.

It is not necessary, however, to find that the legislative grant of authority intended to vest Petitioner with contractual rights. An alternative source of the contract if found in Louisiana's Civil law of contractual obligations. That is, a contract between the Insurance Commissioner and American Home can be implied from all of the facts and circumstances surrounding the Commissioner's approval of the excess insurance policy. *See, Klebe v. United States,* 263 U.S. 188 (1923); *Baltimore & Ohio Railroad Co. v. United States,* 261 U.S. 593 (1922); *V-8 Taxi Cab Service, Inc. v. Hayes,* 322 So. 2d 442 (La.App. 4th Cir. 1975).

This source of contractual rights is found in the Louisiana Revised Civil Code, Article 1761:

> A contract is an agreement, by which one person obligates himself to another, to give, to do or permit, or not to do something, expressed or implied by such agreement.

LSA-C.C. Art. 1761 (1980).

Whether the source of the contract is found in the legislative act[7] or in an implied contract, the consideration which supports the obligations of the respective parties is evident. The State received, in return for its promise to provide American Home with the benefits and protections of the laws of Louisiana, the benefits of an environment conducive to commerce which a stable insurance industry provides.

Without the protection of insurance, transportation, construction and commerce in general would be paralyzed by potential losses. These possibly crippling uninsured losses would dissuage even the most venturous entrepreneur. Such a stagnant business environment would be extremely detrimental to the fiscal well-being of the state. Thus, a healthy,

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[7] Although Louisiana contractual law is not founded upon the common-law concept of consideration, but the Civil law notion of "cause", the difference in the two systems have no bearing on the analysis herein.

stable insurance industry encourages economic growth and expansion at all levels within the state. In return for the obvious benefits of encouraging economic growth, the state provides the insurer with the protection of state laws in the insurer-insured contractual relationship. Further, through the Insurance Commissioner's approval of the insurance policy, the insurance rights and liabilities under the contract are predetermined. This predetermination facilitates the development of underwriting rules and procedures which lends further stability to the insurance industry. The insurer reaps benefits from the stability of predetermined liabilities under the insurance policy and of uniform underwriting procedures in return for providing the state's businesses with the opportunity to allocate accident risks in a manner that precludes financial disaster.

(2) *Contracts Between the Insurance Companies and Their Mutual Insured*

The primary and excess insurance policies issued to Avondale Shipyards comprise the second set of contractual obligations which were altered by the State of Louisiana. Petitioner issued an excess insurance policy which provided in Condition 10 that the excess insurance shall not apply "unless and untill . . . the underlying insurers shall have paid the amount of underlying limits." Of course, Respondent, Commercial Union, had issued a primary policy of specified limits. Both policies were approved by the Insurance Commissioner and were issued under his authority. Although the Louisiana

courts found no ambiguity or conflict between the provisions of the policies, the state courts disregarded their provisions and imposed obligations upon American Home which were not contained in the policies and, hence, not approved by the Commissioner.

C. *The Impairment of Petitioner's Contractual Rights By the State of Louisiana*

This Honorable Court, in *Columbia Railway, Gas and Electric Co. v. South Carolina,* 261 U.S. 236 (1923) defined contractual impairment:

> Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." [Citations omitted.]

261 U.S. at 251.

As is evident from the Court's definition, constitutionally prohibited impairment is not limited to legislative impairment, but includes impairment through judicial decision. Thus, in *Cross Lakes Shooting and Fishing Club v. State of Louisiana,* 224 U. S. 632 (1911), the Court's inquiry was "[h]as the contract . . . been violated [or impaired] by subsequent state action,

either by legislation or by judicial decision equivalent to legislation . . . " 224 U.S. at 632. In *Douglass v. Pike County Mo.*, 101 U.S. 677 (1880), the Court explained that a judicial decision is considered equivalent to a legislative act with respect to the Contract Clause if, after a statute has been construed by judicial decision,

> "the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

101 U.S. at 686. Thus, the subsequent "amendment" is prohibited because it impairs the contractual rights previously acquired.

In the present case, the primary and excess insurance policies became legislation upon the approval by the Commissioner of Insurance.[8] The subsequent judicial reconstruction by Louisiana's courts of the legislatively approved policies worked an "amendment" of the contractual rights. To the extent that the judicial "amendment" impaired rights without

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8 As the court stated in *Home Building & Loan Assn. v. Blaisdell, supra,* at 429-430 [quoting Von Hoffman v. City of Quincy, 71 U.S. 535, 550 (1867).] *supra*, "the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

justification, that "amendment" is constitutionally prohibited. It is to be noted that the Louisiana court's decision is no mere adverse interpretation of Petitioner's contracts. It is an after-the-fact judicial reconstruction of an act of the Louisiana legislature (through an administrative agency) which substantially impaired private [9] contractual rights which had vested through prior legislative approval. There is no difference in effect than if the legislature had approved the form and substance of Petitioner's contract of insurance and, after issuance to Avondale Shipyards, the legislature passed a statute retrospectively dictating different terms and conditions in the policy or abrogating existing provisions.

D. *The Unconstitutionality of Louisiana's Impairment of Petitioner's Contracts*

Not all state action that impairs contractual rights is automatically unconstitutional. As the Court stated in *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977):

> Thus, a finding that there has been a technical impairment is merely a preliminary step in solving the more difficult question whether that impairment is permitted under the Constitution .... We must attempt to reconcile the structures

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9 Petitioner also takes the position that Louisiana's judicial tinkering with legislatively approved insurance policies worked an impairment of Petitioner's contractual relationship with the state.

> of the Contract Clause, with the essential attributes of sovereign power [citations omitted] necessarily reserved by the States to safeguard the welfare of their citizens . . . . . yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation.

431 U.S. at 21. The Court stressed that state action which redistributes contractual rights and liabilities must be based upon reasonable conditions and of a character appropriate to public purposes. The Court made it clear that the same analysis applies to impairments of contracts between public bodies and private parties, as well as impairments of contracts between private parties. In the Court's words:

> It has long been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties.

431 U.S. at 17. Subsequently, the Court elaborated on the constitutionality of impairments of contracts between public entities and private parties.

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.

431 U.S. at 25. In determining the constitutionality of the state action at issue, in *U.S. Trust Co. of N. Y., supra,* the Court engaged in a balancing of the severity of the contractual impairment against the necessity of the state action for the promotion of the public good. There, as in the instant case, a severe impairment of the contract palpably existed. The examination of the necessity of this particular state action was conducted on two levels. First, the court inquired whether the particular state action was essential or whether a less drastic modification would accomplish the contemplated public purpose. Second, the court asked whether the public purpose could be accomplished without modifying the existing covenant.

If the *U.S. Trust Co.* analysis of necessity is applied to the instant case, one concludes that the state action is unconstitutional. Initially, the contemplated public purpose of the state action is unclear. Assuming that the public purpose was to encourage insurance settlement without protracted litigation, this purpose could have been accomplished by a less drastic method than restructuring the insurance policies in effect and thereby redistributing the contractual liability coverages of the insurers. The method chosen in the instant case has a destabilizing effect on the entire insurance industry in Louisiana. Under this approach, losses can be distributed among insurers in a manner totally different from that prescribed by the insurers' contractual relationships. Underwriting assumptions become useless and premiums can bear no relationship to risks.

The state action resulted in a similar impairment of the contractual relationship between American Home and its insured. The issue of impairment of contracts between private parties was addressed by the court in *Allied Structural Steel Co. v. Warren Spannaus*, 438 U.S. 234 (1978). In that case, the State of Minnesota, by statute, imposed a substantial "pension funding charge" upon employers that ceased operations and moved out of the state. The statute substantially altered the contractual relationship between employers and employees regarding pension benefits. As a result, the plaintiff's pension costs were substantially increased.

The Court's first step in analyzing that case was to establish the limitations imposed by the Contract Clause:

> First of all, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is know as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault v.*

> *Springs*, 199 US 473, 480, 50 L.Ed. 274 26 S.Ct. 127.
>
> . . . If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

438 U.S. at 241 and 242.

To determine if the state action was an unconstitutional impairment, the *Allied Steel* Court balanced the severity of the impairment against the public purpose of the action. The court promulgated the test as follows:

> The severity of the impairment measures the height of the hurdle, the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

438 U.S. 246. The Court then specifically related the severity of impairment test to insurance contracts in the following terms:

> These [pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforseen events, can have this effect.

438 U.S. 246 and 247. Thus, the Court clearly considered a disruption of contractual expectations in insurance agreements to be a severe impairment which required an overriding public purpose to justify the state action. The Court decided that the Minnesota statute was an unconstitutional impairment of private contracts because it was not justified by an important public purpose for the following four reasons:

1. The purpose of the state action was not to deal with a broad, generalized social problem;

2. The state action entered an area that was not subject to regulation at the time the contractual

obligations were undertaken and imposed a totally unanticipated obligation on the parties;

3. The state action imposed a severe, permanent, and immediate change in the contractual relations;

4. The state action had a narrow aim leveled at a specific segment of the business community.

All of the reasons for the *Allied Steel* Court's decision are equally applicable to the instant factual situation.

First, the state action was not prompted by the existence of a broad social problem. The fact that Louisiana courts have consistently failed to express the public purpose upon which this kind of action was based indicates that such a purpose has never been contemplated. Therefore, hypothesizing a possible public purpose would not aid the present analysis.

Second, the state action imposed a novel and totally unanticipated obligation on the excess insurer, American Home. With the exception of a handful of very recent decisions, never before in the annals of Louisiana legislative action or of Louisiana jurisprudence had state action required the reordering of contractual insurance liabilities between the primary and excess insurers subsequent to the Insurance Commissioner's approval of the respective policies. While approval of the

policies by the Insurance Commissioner prior to issuance is commonplace, until quite recently there were no previous instances where state action attempted to distribute actual losses in a manner at variance with the approved policies.

Third, the state action imposed an immediate and permanent change in the contractual liability among the primary insurer, the excess insurer and the insured. Effectively, the decision reduced the primary insurer's coverage and increased that of the excess insurer.

Finally, the state action had a very limited aim and scope, i.e., to redistribute liability for losses from the primary insurer to the excess insurer. Such a narrow and palpably redistributive aim is clearly beyond the police power of the state as limited by the Contract Clause.

The immediate impact of the State action is self-evident. An unbargained for and unanticipated liability was thrust upon the excess insurer. Meanwhile, the primary insurer, who had bargained for and planned for the risk, and who had been compensated for assuming the risk, was inexplicably and gratuitously relieved of the liability. More importantly, the logic behind the state action extends beyond the instant case and is equally applicable to all primary and excess insurance coverages. This severe reordering of primary and excess coverage necessitates a recomputation of insurance premiums, potential

loss of reserves, and a host of other risk calculations for all excess insurers within the state. The net effect of this redistribution of risks is that all excess insurance policies within the state will have to be reviewed and quite probably renegotiated. In the final analysis, due to this state action, true excess insurance policies no longer exist in the State of Louisiana. This action can only result in new heights in the ever-increasing spiral of insurance costs and greatly diminished availability of excess insurance policies.

CONCLUSION

For the reasons stated herin, a writ of certiorari should be issued by this Honorable Court to review the judgment of the Louisiana Court of Appeal, Fourth Circuit. For those reasons stated, the writ may issue with docketing for argument and reverse and remand the case with instructions. However, the issues presented are of such moment and so exactly drawn that justice and law may be better served if the writ is granted for brief and argument.

Most Respectfully Submitted,

By: _____

ROBERT D. BJORK, JR.
FRANK M. ADKINS
ERIC A. HOLDEN
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

CERTIFICATE

The undersigned herewith certifies that three (3) copies of the foregoing petition for a writ of certiorari have been mailed this day, postage prepaid, to Felician P. Lozes, 1010 Common St., New Orleans, Louisiana 70112, attorney for Commercial Union Assurance Company, thus serving all parties required.

New Orleans, Louisiana this _____day of July, 1980.

_____

FRANK M. ADKINS

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APPENDIX A

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

AMERICAN HOME ASSURANCE COMPANY	NO. 76-8810
VERSUS	DIVISION "D"
COMMERCIAL UNION ASSURANCE COMPANY	DOCKET: 4

JUDGMENT

The Motion for Summary Judgment, filed herein by defendant, COMMERCIAL UNION ASSURANCE COMPANY, came on for hearing on the 20th day of April, 1979, and was taken under advisement by the Court.

PRESENT: FRANK M. ADKINS, Esq., attorney for plaintiff,
FELICIEN P. LOZES, Esq., attorney for defendant,

WHEN, After hearing the pleadings, the evidence and the argument of counsel, the Court, after taking the matter under advisement for further consideration and adjudication, after considering the law and the testimony and other evidence adduced, for the written reasons this day given:

IT IS ORDERED, ADJUDGED AND DECREED That the Motion for Summary Judgment, filed herein by defendant, COMMERCIAL UNION ASSURANCE COMPANY, be and the same is hereby granted dismissing the suit of plaintiff, AMERICAN HOME ASSURANCE COMPANY, at its cost.

JUDGMENT RENDERED AND SIGNED in Open Court on this 2nd day of May, 1979.

_____

JUDGE

APPENDIX B

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

AMERICAN HOME ASSURANCE COMPANY	NO. 76-8810
VERSUS	DIVISION "D"
COMMERCIAL UNION ASSURANCE COMPANY	DOCKET: 4

REASONS FOR JUDGMENT

In the instant procedings, American Home Assurance Company sued Commercial Union Assurance Company to recover the sum of $62,500.00 which plaintiff claims to have paid under its "excess" policy, prior to defendant having paid its entire policy limits under its "primary" policy of insurance.

A Motion for Summary Judgment was heretofore filed by plaintiff and denied by the Court. The matter is now before the Court on a Motion for Summary Judgment filed by the defendant, Commercial Union Assurance Company.

It is apparent that that there are no material facts in dispute and the sole issue is whether or not plaintiff has an action against defendant for the recovery of the $62,500.00

which plaintiff paid to claimants in compromise of its liability under its "excess" policy.

As set forth in plaintiff's memorandum in support of its own Motion for Summary Judgment, plaintiff's policy of insurance specifically provided that the companies' liability would not attach "unless and until the insured, or the insured's underlying insurer, shall have paid the amount of underlying limits." Under this provision of its policy the plaintiff was therefore under no obligation to make payment to the claimant. However, having determined to enter into a compromise of its possible liability by the payment to the claimant of a sum less than the limit of its policy, it did the same thing which the primary insurer did.

The primary insurer (defendant herein) entered into a compromise settlement wherein it was actually released from its total liability by the payment of a lesser sum. Having done this, the Court is of the opinion that plaintiff cannot now claim the amount which defendant saved by the compromise agreement. The case upon which plaintiff relied, i.e., *Maryland Casualty vs Marquette Casualty Co.*, 143 So. 2d 249 (La. app. 4th Circuit 1962) in its memorandum in support of its summary judgment motion has undoubtedly been overruled by the case of *Futch vs Fidelity and Casualty Company*, 166 So. 2d 276 (Supreme Court La. 1964) in which it was clearly stated that the fact that the primary insurer was able to settle

its total liability of $10,000.00 for $6,000.00 was of no consequence to the excess insurer who was responsible for "excess coverage."

The Court is of the opinion that the Motion for Summary Judgment, filed by Commercial Union Assurance Company, should be granted.

New Orleans, Louisiana,
on this 2nd day of
May, 1979.

_____

JUDGE

APPENDIX C

AMERICAN HOME ASSURANCE COMPANY — NO. 10790

VERSUS — COURT OF APPEAL

COMMERCIAL UNION ASSURANCE COMPANY — FOURTH CIRCUIT

STATE OF LOUISIANA

* * * *

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS,
STATE OF LOUISIANA,
NO. 76-8810.

* * * *

PATRICK M. SCHOTT
JUDGE

* * * *

(Court composed of Judges John C. Boutall, Patrick M. Schott and John T. Hood, Jr., ASSIGNED)

Frank M. Adkins
Adams and Reese
4500 One Shell Square
New Orleans, La. 70139
Attorneys for Plaintiff-Appellant

Steven M. Lozes
Drury & Lozes
Suite 850, 1010 Common Street
New Orleans, La. 70112

AFFIRMED

American Home Assurance Company has appealed from a summary judgment dismissing its claim against Commercial Union Assurance Company for $62,500 appellant paid to two injured workmen in settlement of their claim against executive officers who were insured against public liability by appellant and appellee. Appellant provided excess insurance over the primary coverage up to $300,000, provided by appellee.

After suing the executive officers and appellee, the workmen settled their claims with appellee for $214,000, reserving their right to continue their claim against the executive officers and appellant for amounts over and above the appellee's $300,000 primary limits. Thereupon appellant assumed the defense of the executive officers in the suit and was faced with considerable exposure prompting it to make a settlement with the workmen. Appellant takes the position that its payment to the workmen fell within the limits of appellee's - the primary insurer's - policy, so that it is entitled to recovery under a theory of either subrogation or unjust enrichment.

In support of its subrogation theory appellant relies on *Maryland Casualty Co. v. Marquette Casualty Co.*, 143 So. 2d 249 (La. App. 4th Cir. 1962). In this case, Marquette was the primary insurer of Gulf Engineering Company with $5,000 limits. Maryland was Gulf's excess insurer. Sued for over $400,000 Gulf called on Marquette to defend, was refused, and then called on Maryland to defend. The suit was eventually

compromised for $,375 with Marquette contributing $4,375 and Maryland $250. Had Maryland not contributed, Gulf would not have been included in plaintiff's release. Maryland claimed the $250 against Marquette plus the cost it incurred in defending Gulf.

The court's decision in Maryland's favor was grounded on the fact that Marquette had the primary duty to defend Gulf but forced Maryland to assume Marquette's obligation. Marquette abandoned Gulf and Maryland's contribution of $250 not only secured Gulf's release against liability but also freed Marquette of its obligation to defend Gulf. In the instant case the insureds were protected under the terms of the release from exposure up to $300,000 and the only exposure remaining was appellant's, i.e., any amount in excess of $300,000. Thus, unlike Maryland in the cited case, appellant did not pay anything in appellee's behalf and no basis for subrogation exists.

In any event, the *Maryland v. Marquette* case must yield to *Futch v. Fidelity & Casualty Company,* 246 La. 688, 166 So.2d 274 (1964). There the tort feasor was insured by Allstate for up to $5,000 per person and $10,000 per accident and by F & C for the same limits but as excess insurer over Allstate. Allstate settled with the two claimants for $6,000 and obtained releases for all potential defendants except F & C. The claimants proceeded with suit against F & C and were awarded a judgment for $1,893.70. F & C contended that its liability

did not arise because the primary limits of Allstate were never exhausted, but the court reasoned:

> "This proposition is without substance. Factually, Allstate has been released from all liability which simply means that it has been credited with its total primary coverage of $10,000. The circumstances that Allstate was able to settle its liability for $6,000 is of no consequence in determining the responsibility of F & C for excess coverage. Indeed, the trial judge evaluated the combined damages sustained by Janice Futch, Nan Tucker and Ann Tucker Stuckey at $11,893.70 or $1,893.70 over the $10,000 policy limit of Allstate. The judgments against F& C in favor of Ann Tucker Stuckey for $700 and in favor of Theos Futch for $1,193.70 conform with these findings."

In the instant case, the only difference is that the case was settled by the excess insurer instead of the case proceeding to judgment. In making the payment to the injured workmen appellant settled its own liability, not appellee's, and no basis for subrogation exists.

Likewise without merit is appellant's release on enrichment lately discussed in *Edmonston v. A-Second Mortgage Co. of Slidell, Inc.*, 289 So. 2d 116 (La. 1974). The first two necessary elements for the application of the doctrine are an enrichment to appellee and an impoverishment to appellant. Neither is present. We cannot agree that appellee was enriched when it settled a contested claim for an amount which was

possibly in excess of the claim's judgment value. As to appellant's supposed impoverishment, it was on a risk in excess of $300,000 up to $1,000,000 because it contracted for such and was paid premiums. The $62,500 it paid was to settle only its own liability under its contract. This is not an impoverishment but simply a routine settlement of a disputed insurance claim.

Accordingly, the judgment appealed from is affirmed.

AFFIRMED

APPENDIX D

COURT OF APPEAL - FOURTH CIRCUIT
STATE OF LOUISIANA
NO. 10790

AMERICAN HOME ASSURANCE COMPANY
Plaintiff - Appellant
VERSUS
COMMERCIAL UNION ASSURANCE COMPANY
Defendant - Appellee

ON APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS,
THE HONORABLE SANFORD LEVY,
JUDGE PRESIDING

APPLICATION FOR REHEARING
AMERICAN HOME ASSURANCE COMPANY

Frank M. Adkins
ADAMS AND REESE
4500 One Shell Square
New Orleans, Louisiana 70139
Phone: 581-3234
Attorneys for Plaintiff-
Appellant
American Home Assurance
Company

AMERICAN HOME ASSURANCE COMPANY

VERSUS

COMMERCIAL UNION ASSURANCE COMPANY

NO. 10790

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

* * * *

APPLICATION FOR REHEARING

NOW INTO COURT, through undersigned counsel, comes American Home Insurance Company, Appellant, who respectfully represents that the judgment of this Honorable Court rendered herein on the 10th day of January, 1980, affirming the Summary Judgment of the Civil District Court for the Parish of Orleans in favor of Commercial Union Assurance Company, Appellee herein, and dismissing Plaintiff's suit, is erroneous and contrary to law and is prejudicial to the Appellant for the following reasons:

I.

1) It errs in implicitly holding that American Home Assurance Company has no cause of action against the Commercial Union Assurance Company;

2) It errs in failing to find a cause of action in favor of American Home Assurance Company under the theory of legal subrogation:

3) It errs in failing to find a cause of action in favor of American Home Assurance Company under the

theory of action de in rem; i.e., unjust enrichment; and

4) It errs in failing to find a cause of action in favor of American Home Assurance Company based on Commercial Union Assurance Company's breach of duty to the Appellant to confect reasonable settlement.

II.

Petitioner files herewith in connection with this application for rehearing, a brief in support thereof and shows that for the reasons hereinabove stated and amplified in the said brief, a rehearing should be granted herein.

WHEREFORE, petitioner prays that a rehearing be granted in this cause and that after due proceedings had the judgment rendered herein on the 10th day of January, 1980 be set aside and reversed and that there be judgment herein reversing the summary judgment in favor of defendant, Appellee, and that the Motion for Summary Judgment brought by the plaintiff, Appellant, be granted.

Respectfully submitted,

ADAMS AND REESE

BY:_____

FRANK M. ADKINS
Attorney for American
Home Assurance
Company
4500 One Shell Square
New Orleans, LA 70139

ORDER

Considering the foregoing Application for Rehearing and being of the opinion that good cause is shown therin for granting rehearing, let the above entitled and numbered cause be fixed for argument as a preference case.

_____

JUDGE

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

FRANK M. ADKINS

Attorney for American Home Assurance Company, Appellant herein, who, being duly sworn, deposed and said:

That he served a copy of the Application for Rehearing on Steven M. Lozes, Attorney of Record for Commercial Union Insurance Company, Appellee herein, by placing a copy addressed to him at Suite 1850, 1010 Common Street, New Orleans, Louisiana in the United States mail, postage prepaid.

New Orleans, Louisiana this _____ day of _____, 1980.

_____
FRANK M. ADKINS
Attorney for Appellant

AMERICAN HOME
ASSURANCE COMPANY

VERSUS

COMMERCIAL UNION
ASSURANCE COMPANY

NO. 10790

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

* * * *

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

MAY IT PLEASE THE COURT:

The petition of American Home Assurance Company, Plaintiff and Appellant in the above entitled and numbered cause, respectfully represents that the judgment of this Honorable Court rendered herein on the 10th day of January, 1980, affirming the judgment of the Civil District Court for the Parish of Orleans, which granted Defendant's Motion for Summary Judgment and dismissed Plaintiff's suit, is erroneous and contrary to law and is prejudicial to the Plaintiff.

The Motion for Summary Judgment filed by Commercial Union Assurance Company, Defendant and Appellee herein, is grounded in the argument that Appellant has no cause of action. In affirming the trial court's summary judgment in favor of Commercial Union this Honorable Court implicitly holds that American Home Assurance Company has no cause of action.

The record shows that two injured workmen filed suits against executive officers who were insured against public liability by the Appellee and the Appellant. The Appellant provided excess coverage over the primary coverage of $300,000.00 provided by the Appellee.

The workmen settled their claims against Commercial Union for $214,000.00 but reserved their rights against the excess insurer, i.e. the Appellant. Subsequently, the workmen settled their claims against the Appellant for $62,500.00. Thus, the total sum of the settlement was $276,500.00, an amount which is well within the primary limits afforded by the Appellee.

It is thus clear that the workmens' suits could have been settled within the limits of primary coverage and that the Appellee has utilized coercive tactics to avoid bearing the full brunt of its primary liability. As a result of this coercion, the Appellant, who contracted to provide only excess insurance, has been forced to step in and assume liability even though the primary coverage has not been exhausted. Contrary to this Honorable Court's holding, under these circumstances, Appellant, American Home Assurance Company, undoubtedly has a cause of action to recover those sums the Appellant has paid which are within the limits of the Appellee's coverage.

Appellant has previously raised two theories under which it may recover from the Appellee. These theories of recovery are 1) legal subrogation, and 2) *actio de in rem verso;* i.e., unjust enrichment. In addition to these theories of recovery, American Home Assurance Company asserts that a primary insurer has a direct duty to an excess insurer to properly settle disputed claims, and a primary insurer's negligent settlement gives rise to a cause of action in favor of an excess insurer who is damaged thereby.

This Honorable Court errs in its interpretation of *Maryland Casualty Company v. Marquette Casualty Company,* 143 So. 2d 249 (La. App. 4th Cir. 1962) and *Futch v. Fidelity and Casualty Company,* 246 La. 688 166 So. 2d 274 (1964) in the instant case. This Honorable Court incorrectly distinguishes *Maryland Casualty Company*, supra, wherein a primary insurer was required to reimburse an excess insurer for sums the latter paid in settlement which were within the limits of primary coverage. The instant case is comparable to *Maryland Casualty Company,* in that here, as in the cited case, the primary insurer's actions exposed the *insured* to potential liability, and only the excess insurer defended the insured against such potential liability. This Honorable Court errs in holding that after the primary insurer settled with the claimants, "the only exposure remaining was appellant's, i.e. in the amount in excess of $300,000.00." In fact, the *insured* was indeed exposed for

amounts in excess of $300,000.00, and it was the conduct of the Appellee which failed to remove this exposure.

This Honorable Court also errs in its interpretation of *Futch*, supra. In *Futch*, the Court as a matter of fact, held that the claimants' injuries were in excess of the limits of primary coverage. Therefore, the excess insurer was held responsible for the amount of the loss which exceeded the primary coverage. The instant case is clearly distinguishable from *Futch*, inasmuch as the sum of the settlements in the case at bar was *less* than the limits of primary coverage. Consequently, reliance on *Futch* is misplaced.

This Honorable Court further errs in holding that two elements necessary for the application of the doctrine of unjust enrichment, enrichment to the Appellee and impoverishment to the Appellant, are lacking in this case. Rather, Commercial Union Assurance Company was enriched by Appellant's payment of sums which were within the limits of Appellee's coverage. Correspondingly, American Home Assurance Company, was impoverished inasmuch as it, in protecting its insured, was forced to pay sums in settlement even though its excess policy limits had not yet been reached. Had the primary insurer, Appellee, properly settled the disputed claims, such a payment by the Appellant would not have been necessary.

Appellant additionally asserts liability on the part of Appellee as a result of Commercial Union's breach of the duty to confect a reasonable settlement. That is, a primary and excess insurer have a direct duty to each other to confect reasonable settlement, and the Appellee breached that duty in the instant case. Though there is no express authority for this proposition, Louisiana jurisprudence clearly establishes the duty of an insurer to consider as paramount the interest of the insured when an offer to settle is made. The insurer has a duty to act in good faith and to deal fairly when handling and settling claims in order to protect the insured from exposure to excess liability. *Holtzclaw v. Falco, Inc.*, 355 So. 2d 1279 (La. 1978). The logical progression from that holding is that a primary insurer has a duty to act in good faith and to deal fairly when handling and settling claims in order to protect the excess insurer from exposure to excess liability. This duty of a primary insurer directly to an excess insurer has been expressly imposed. *Transit Casualty Company v. Spink Corporation and American Motorist Insurance Company*, Cal. Ct. Ap. 3rd App. Dst., 3 Civil 16182 (A copy of the decision is attached).

In the instant case, the Appellee has breached its duty to both the insured and the excess insurer, Appellant, in settling the disputed claims in a manner which focused the claimants' actions upon the excess insurer when in fact, as

evidenced by the sum of the settlements reached, the claims in the instant case could have been settled for an amount well within the limits of primary coverage. If not for the bad faith of the Appellee in the method of settling the disputed claims, the Appellant would not have been forced to make payment of $62,500.00 to the claimants. This Court erred in holding that the Appellant does not have a cause of action to redress that wrong.

For the foregoing reasons, it is submitted that the Application for Rehearing should be granted, that the Summary Judgment in favor of the Appellee should be reversed, and that Summary Judgment in favor of Appellant should be granted.

Respectfully Submitted,

ADAMS AND REESE

BY: _____

/S/ FRANK M. ADKINS
4500 One Shell Square
New Orleans, LA 70139
Telephone: (504) 581-3234

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, February 20, 1980

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED AMERICAN HOME ASSURANCE CO. v. COMMERCIAL UNION ASSURANCE CO.

No. 10790

Very truly yours,

MARJORIE R. CAMBRE, Clerk

APPENDIX E

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

AMERICAN HOME ASSURANCE COMPANY

VERSUS NO. 67,129

COMMERCIAL UNION ASSURANCE COMPANY

In Re: American Home Assurance Company, applying for Certiorari, of writ of review, to the Court of Appeal, Fourth Circuit, No. 10,790, Parish of Orleans.

April 18, 1980

Writ denied.

FAB
JAD
PFC
WFM
JCW

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
April 18, 1980

/S/ Clerk of Court

APPENDIX F

Part 14 THE INSURANCE CONTRACT R.S. 22:620

§ 620. Approval forms

A. No basic insurance policy form other than surety bond forms, or application form where written application is required and is to be attached to the policy, or be a part of the contract or printed life or health and accident rider or endorsement form shall be issued, delivered, or used unless it has been filed with and approved by the commissioner of insurance. This Section shall not apply to policies, riders or endorsements designed to delineate the coverage for and used with relation to insurance upon a particular subject; nor which relates to the manner of distribution of benefits or to the reservation of rights and benefits under such policy, and which is used at the request of the individual policyholder, contract holder or certificate holder. Any insurer may insert in its policies any provisions or conditions required by its plan of insurance or method of operation which are not prohibited by the provisions of this Code.

B. Every such filing shall be made not less than thirty days in advance of any such issuance, delivery, or use. At the expiration of thirty days the form so filed shall be deemed approved unless prior thereto it has been affirmatively approved

or disapproved by order of the commissioner of insurance. The commissioner of insurance may extend by not more than an additional fifteen days the period within which he may so affirmatively approve or disapprove any such form, by giving notice of such extension before expiration of the initial thirty day period. At the expiration of any such period as so extended, and in the absence of such prior affirmative approval or disapproval, any such form shall be deemed approved. The commissioner of insurance may withdraw any such approval at any time for cause. Approval of any such form by the commissioner of insurance shall constitute a waiver of any unexpired portion of such initial fifteen day waiting period.

C. The commissioner of insurance's order disapproving any such form or withdrawing a previous approval shall state the grounds therefor.

D. No such form shall knowingly be so issued or delivered as to which the commissioner of insurance's approval does not then exist.

E. The commissioner of insurance, may, by order, exempt from the requirements of this Section for so long as he deems proper, any insurance document or form or type thereof as specified in such order, to which in his opinion this Section may not practicably be applied, or the filing and

approval of which are, in his opinion, not desirable or necessary for the protection of the public.

Amended by Acts 1958, No. 125; Acts 1960, No. 176, § 1.